Supreme Court, U. S.
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No. 80-450

IN THE

Supreme Court of the United States

October Term 1980

AHMANSON TRUST COMPANY, a corporation,
Plaintiff-Respondent,

vs.

CLAYTON W. CARNEY; JACQUETTA A. CARNEY,
Defendants-Petitioners.

ON APPEAL FROM THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI.

A. J. WEISS,
9595 Wilshire Blvd., Suite 710,
Beverly Hills, Calif. 90212,
(213) 272-8667 and 273-8667,
Attorney for Plaintiff-Respondent, Ahmanson Trust Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Statement of Facts.

The Petitioners have attempted in their Petition to set forth the pertinent facts relating to this matter. Unfortunately, however, Respondent cannot agree that the facts which they have stated are the critical facts upon which their request for Writ of Certiorari should be determined.

The proper facts for consideration are those which are set forth in the opinion of the Court of Appeal of the State of California, Second Appellate District, Division 4, which was filed on April 11, 1980, and which is appended to Petitioner's Petition for Writ of Certiorari.

ARGUMENT.

1. Introduction

Petitioner's request for a Writ of Certiorari should be viewed for what it really is. It is not an effort to have important federal and constitutional questions decided. On the contrary, it is a "last-ditch" attempt on the part of the debtors who have borrowed money from a bank to seek to find some excuse to justify their failure to repay the sum when it was due, and avoid ever having to repay that loan. When Respondent refused to convert the series of short-term, unsecured loans which it had made to Petitioners, and which had become due and in default, to a long-term loan secured by real estate, the Petitioners herein claimed, *without basis therefor*, that their civil rights were violated in some vague, unspecified manner as a means for justifying such failure to repay the loans. Defeated in the trial court and in the California Appellate Courts, Petitioners now seek a review by the United States Supreme Court. It is respondent's position that not only were the decisions of the California trial and appellate court entirely proper, but that there are no federal questions of substance to be determined in this matter.

2. A Review by Writ of Certiorari Is Not Warranted Since There Is No Federal Question of Substance to Be Determined With Reference to California's Summary Judgment Statute.

Petitioners have sought to invoke the jurisdiction of the United States Supreme Court by questioning the constitutionality of the statute of the State of California establishing the summary judgment procedure. That statute which is California Code of Civil Procedure Section 437(c) provides for the granting of a summary judgment against a party in

situations where there is no triable issue of fact involved and the matter can be determined as a matter of law.

For the first time in this litigation, Petitioners are raising that issue in their Petition for Writ of Certiorari filed in the United States Supreme Court. They did not raise the issue at any prior stage of the proceedings in the trial court, in the California Court of Appeal, and in the California Supreme Court. Under the circumstances, it would appear that Petitioners' Petition for Writ of Certiorari does not comply with paragraph 1.(f) of Rule 23 of the Rules of the Supreme Court of the United States, for they do not mention anywhere therein the manner and circumstances of their raising that issue.

The question of the constitutionality of California Code of Civil Procedure Section 437(c), the summary judgment statute, and its compatibility with the Seventh Amendment to the United States Constitution relating to the preservation of the right of trial by jury, was considered by an appellate court in California in the case of *Bank of America National Trust & Savings Association v. Oil Well Supply Co. of California* (1936) 55 P.2d 885, 12 Cal.App.2d 265, and it was held therein that the statute is not unconstitutional as depriving a defendant of the right to trial by jury.

The summary judgment statute of California bears great similarity to the summary judgment statutes utilized in federal cases as the same has been embodied in Rule 56 of the Federal Rules of Civil Procedure. In prior cases the United States Supreme court has considered the same question, namely the validity of the similar Federal Summary Judgment Statute in light of the provisions of the Seventh Amendment relating to trial by jury. See *Ex Parte Peterson* (1920) 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed 919, and *Fidelity and Deposit Co. of Maryland v. United States* (1902) 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed 194. In each

of these cases, it was determined that the summary judgment procedure does not infringe the constitutional right to trial by jury.

Although Petitioners suggest that their rights to due process under the Fourteenth Amendment to the United States Constitution have been violated, they do not specify how or what manner that may have occurred, they cite no authority therefor, and raise this issue for the first time in this litigation.

Inasmuch as the issue has previously been determined and settled by the United States Supreme Court, it is respectfully submitted that there is no federal issue of substance to be determined by the court at this time upon the Petition for Certiorari filed by the Petitioners particularly insofar as it relates to the constitutionality of California's summary judgment statute.

3. There Is No Federal Question of Substance to Be Determined With Respect to the Fair Housing Laws or the Civil Rights Act of 1968.

The Equal Credit Opportunity Act (15 USCA §1691 et seq.) is a group of statutes designed to prevent discrimination by a creditor ". . . on the basis of race, color, religion, national origin, sex or marital status or age. . . ." 15 USCA §1691(a)(1).

The portions of the CIVIL RIGHTS ACT of 1968 (42 USC §3601 et seq.) cited by Petitioners relate to a group of statutes designed to prevent discrimination in the financing of housing and prohibit denial of a loan or discrimination ". . . because of the race, color, religion, sex, or national origin of such person. . . ." who applies for the loan "for the purpose of purchasing, constructing, improving, repairing, or maintaining a DWELLING . . ." (Emphasis added).
42 USCA §3605.

In their declarations filed in opposition to Respondent's Motion for Summary Judgment, the Petitioners totally failed to set forth facts which in any manner suggested that they had been discriminated against by reason of their race, color, religion, sex, marital status, age or national origin.

Furthermore, the defendants never suggested that a "dwelling" was involved or that the loan which was wanted was for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling. The facts in the record speak very much to the contrary.

While the Equal Credit Opportunity Act and the Civil Rights Act of 1968, in the the event of violations of some of their provisions, provide for the specific remedy of a civil action to recover damages incurred within certain specified periods of limitation, there is nothing that Respondent has been able to determine from said statutes which affords relief in the form of a defense to the payment of a loan which was previously made and renewed, and which was due at the time of a request for a real estate loan. Certainly the petitioners have cited no such statute.

The Civil Rights statutes they have cited were never intended to provide a defense to a defaulting debtor in a situation such as is here presented. At no time did the petitioners in the declarations which they presented in opposition to the motion for summary judgment rendered against them in the courts below, state facts which the court could consider to bring them within the purview of said statutes.

Even if we were to assume arguendo that in a proper case these statutes could afford an affirmative defense, that could not in any way support Petitioners' cause in this case.

Throughout the proceedings in the lower courts, and in their Petition for Writ of Certiorari, it is clear that the Pe-

titioners are unwilling to accept that the summary judgment procedure which exists not only in California but also exists under the Federal rules as well, is for the purpose of discovering through the media of affidavits whether the parties possess evidence requiring a formal trial of the action. The statutes require that to properly oppose a motion for summary judgment, facts must be stated by affidavit which establish the factual existence of such a defense, and merely pleading the defense is not sufficient. In the instant case, Petitioners have made numerous references to their pleading of affirmative defenses, but in actuality Petitioners lost in the courts below not because of their pleadings, but rather as a result of their total lack of factual evidence to set forth any defense of any nature, whether pleaded or not, to their obligation to pay their just indebtedness.

Conclusion.

As hereinbefore demonstrated, there are no federal questions of substance involved in this matter. It is simply the case of two borrowers who are trying to avoid repayment to a lender of monies which were properly loaned to them. This court should not lend its assistance to these debtors in their endeavor to escape their obligations, and accordingly, should deny their Petition for Writ of Certiorari.

Respectfully submitted,

A. J. WEISS,

Attorney for Plaintiff-Respondent, Ahmanson Trust Company.

APPENDIX A.

Summary Judgments.

§437c. [Summary proceedings on claim that action or defense is unmeritorious: Motion: Support of motion: Procedure on Motion: Judgment: Appeal] Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at such earlier time after such general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on the other party to the action at least 10 days before the time fixed for the hearing. The motion shall be heard no later than 45 days before the date of trial, unless the court for good cause orders otherwise. The filing of such motion shall not extend the time within which a party must otherwise file a responsive pleading.

The motion shall be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken.

Such motion shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is not triable issue as to any material fact the court shall consider all of the admissible evidence set forth in the papers and all inferences reasonably deducible from such evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from

such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to such fact; or where a material fact is an individual's state of mind, or lack thereof, and such fact is sought to be established solely by the individual's affirmation thereof.

If it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that such issues are without substantial controversy. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit

affidavits to be obtained or discovery to be had or may make such other order as may be just.

If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting such affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused such other party to incur.

Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of such action, but the final judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the summary proceeding herein provided for.

A summary judgment entered under this section is an appealable judgment as in other cases. [1973 ch 366 §2; 1976 ch 675 §1; 1978 ch 1949].